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No. 04-1332

In the Supreme Court of the United States

RICHARD WILL, ET AL., PETITIONERS

v.

SUSAN HALLOCK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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REPLY BRIEF FOR THE PETITIONERS

The Federal Tort Claims Act (FTCA) provides, without limitation, that "[t]he judgment in an action under section 1346(b) of this title shall constitute a complete bar" to an action against a federal employee concerning the same subject matter as the FTCA suit. 28 U.S.C. 2676. Respondents do not dispute that they previously sued the United States under 28 U.S.C. 1346(b), that judgment was entered against them in that FTCA action, and that the present action, brought against the individual government employees under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), arises out of the same subject matter as respondents' prior action. Section 2676, by its terms, thus bars respondents' suit. Respondents' attempts to avoid the plain text of the statute are unavailing.

A. The Denial Of Petitioners' Statutory Immunity From Suit Under Section 2676 Was Immediately Appealable

As the court of appeals properly recognized, the statutory immunity from suit afforded federal employees by Section 2676 serves the same interests that this Court has previously recognized as warranting immediate appellate review. Respondents do not dispute that the first two requirements for immediate review under the collateral order doctrine as articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), are satisfied here. The district court's denial of petitioners' motion to dismiss on the basis of the judgment bar in Section 2676 "conclusively determine[d] the disputed question," and "resolve[d] an important issue completely separate from the merits of the action." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). See Gov't Br. 18-19.

We demonstrate in our opening brief (at 19-24) that the third prong of the Cohen test is also satisfied, because the question whether Section 2676 guarantees petitioners protection against further litigation would "be *effectively*

unreviewable on appeal from a final judgment." *Puerto Rico Aqueduct*, 506 U.S. at 144 (emphasis added). As the court of appeals in this case held, Section 2676 is properly understood as conferring a "statutory immunity from suit." Pet. App. 10a-11a; accord *Farmer* v. *Perrill*, 275 F.3d 958, 961 (10th Cir. 2001); see Gov't Br. 19-22. The judgment bar does not speak in terms of merely providing a defense against liability. Rather, Section 2676 directs that an FTCA judgment shall constitute "a *complete* bar to any *action*" against the federal employee. 28 U.S.C. 2676 (emphasis added). Thus, it is the "action" that is barred, and it is barred "complete[ly]." Appeal of an erroneous Section 2676 decision after trial and final judgment would not vindicate the "complete bar" to the burdens of litigation that the statute guarantees.

Moreover, the interests that are protected by Section 2676 are ones that have been recognized repeatedly as warranting immediate appeal. The judgment bar was enacted principally to address the "very real attack upon the morale" of public servants, who were "not in a position to stand or defend large damage suits." *United States* v. *Gilman*, 347 U.S. 507, 511-512 n.2 (1954) (quoting testimony of Assistant Attorney General Francis M. Shea). That same governmental interest in minimizing the toll on the public interest caused by the distraction and inhibition of government employees in the performance of their official duties has been recognized as sufficiently important to warrant immediate review of immunity defenses in the context of common law official immunity, see, *e.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985), and statutory immunities like the provision of the FTCA itself, 28 U.S.C. 2679(b), that provides for substitution of the United States and dismissal of the action against the individual employee arising out of the same subject matter, see Gov't Br. 23-24 (citing cases).

Respondents in fact concede (Br. 22) that "if Petitioners could show that the statute conferred an immunity," any fur-

ther burden of demonstrating that the third prong of the *Cohen* test is satisfied "would be minimal." In this regard, respondents acknowledge (Br. 23) that in passing the Westfall Act, in which Section 2679(b) was enacted, Congress regarded that provision as affording federal employees "immunity," even though Section 2679(b) does not use that word. See H.R. Rep. No. 700, 100th Cong., 2d Sess. 2 (1988); *Gutierrez de Martinez* v. *Lamagno*, 515 U.S. 417, 426 (1995) (characterizing the Westfall Act's protection as a "personal immunity"). And respondents do not dispute that both Section 2679(b) and Section 2676 serve the same purpose—avoiding the distraction and inhibition of public employees resulting from suits relating to acts within the scope of their employment—and do so in the same manner—barring a claim against the individual employee where there the plaintiff can sue (Section 2679(b)) or has sued (Section 2676) the government under Section 1346(b). Thus, Congress's view that Section 2679(b) confers an "immunity," H.R. Rep. No. 700, *supra*, at 2, strongly supports the conclusion that Section 2676 confers an immunity from suit as well.

Respondents nevertheless contend that vindication of federal employees' protection under Section 2676 must await review after trial and final judgment. Resp. Br. 19, 25. Respondents' argument depends on two related premises: first, that Section 2676 is simply a rule of "res judicata," *id.* at 20; and, second, that *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863 (1994), establishes a categorical rule that a claim in the nature of "res judicata" is not immediately appealable under the collateral order doctrine. Both of those premises are incorrect.

1. Section 2676 Is Distinct From The Common Law Doctrine Of Res Judicata

Respondents posit that Section 2676 was intended "to extend the traditional principles of res judicata to cover the government employees whose conduct underlies an FTCA

claim." Resp. Br. 9. In other words, respondents contend that Congress intended to incorporate every nuance of the common law doctrine of res judicata, with the single exception of relaxing the requirement of mutuality. See, *e.g.*, Resp. Br. 13-14. That argument does not withstand scrutiny.

As respondents note, the classic statement of the doctrine of res judicata is that "a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." Resp. Br. 13 (quoting *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n.5 (1979)). That traditional rule embodies three principal elements: (1) the nature of the prior judgment, which must be "on the merits"; (2) the relationship of the parties to the two cases, who must be "the same parties or their privies"; and (3) the relationship between the subject matter of the two suits, which must be "based on the same cause of action." Section 2676 departs from the common law rule with respect to each of these elements.

Respondents acknowledge that Congress rejected the traditional res judicata requirement of mutuality by applying Section 2676's bar to suits against "the government employees whose conduct underlies an FTCA claim." Resp. Br. 9. Thus, despite the fact that "at the time the FTCA was enacted, the federal courts required mutuality," *id.* at 10, Congress established that federal employees could claim the benefit of a judgment in an action against the United States under the FTCA.[1]

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[1] Moreover, even now, nonmutual claim preclusion ordinarily applies only "where the party asserting res judicata should have been joined in the first action and the party against whom it is being asserted cannot show any good reason why he was not joined." 47 Am. Jur. 2d *Judgments* § 653 (1995). See, *e.g.*, *In re El San Juan Hotel Corp.*, 841 F.2d 6, 10 (1st Cir. 1988). Yet Section 2676 applies even if the claim against the federal employee could not have been joined with the original FTCA action, such as, before supplemental party jurisdiction existed, because of the absence of diversity. See, *e.g.*, *Bullock* v. *United States*, 72 F. Supp. 445 (D.N.J.

Similarly, Congress did not limit the scope of the bar to suits "based on the same cause of action." *Parklane Hosiery*, 439 U.S. at 326 n.5. See Restatement of Judgments § 63 (1942) (judgment bars subsequent "action on the same cause of action"). Rather, Section 2676 specifies that it bars "any action by the claimant[] by reason of the same subject matter." 28 U.S.C. 2676. By contrast, according to the traditional rule, "a judgment in a former suit, although between the same parties and relating to the same subject matter, is not a bar to a subsequent action, when the cause of action is not the same." 34 C.J. *Judgments* § 1231, at 813 (1924); see, *e.g.*, *Graff Furnace Co.* v. *Scranton Coal Co.*, 266 F. 798, 802-803 (3d Cir. 1920) (a cause of action for removal of vertical support to surface land is distinct from a cause of action regarding the right to lateral support, and a prior judgment on the former did not preclude a second action on the latter). Indeed, a law review article cited by respondents recognizes that, in addition to "extend[ing]" protection beyond traditional res judicata rules "by providing that actions against the United States bar actions against the employee," Section 2676's "loose expression 'by reason of the same subject matter' * * * extends the common law rules by barring further suits even though based on a different cause of action." Harry Street, *Tort Liability of the State: The Federal Tort Claims Act and the Crown Proceedings Act*, 47 Mich. L. Rev. 341, 358 (1949).[2]

1947) (dismissing for lack of diversity jurisdiction a claim against a private defendant that had been joined in an FTCA action).

[2] When the FTCA was enacted, the common law of res judicata was beginning to move away from formalistic distinctions based on "cause of action," although the Restatement of Judgments (1942) continued to use that phrase. See *id.* § 45(a) and (b); *id.* § 63. The Second Restatement rejects the term "cause of action" in favor of "claim," which it defines by reference to "the transaction, or series of transactions, out of which the action arose." Restatement (Second) of Judgments § 24(1) (1982).

Finally, whereas the traditional rule of res judicata expressly applies only to a prior judgment "on the merits," *Parklane Hosiery*, 439 U.S. at 326 n.5, the FTCA judgment bar does not incorporate that limitation. Rather, the text of Section 2676 establishes its own test—whether there has been a "judgment in an action under section 1346(b)"—without regard to whether the judgment was "on the merits."[3]

Thus, respondents are wrong to equate the statutory protection afforded federal employees under Section 2676 and the distinct and more limited common law doctrine of res judicata.

2. The Interests Protected By Section 2676 Are The Same As Those That Have Been Previously Recognized As Warranting Immediate Review

Respondents rely heavily on the Court's decision in *Digital Equipment*. There, the Court acknowledged that the defendant's rights under a private settlement agreement, like a defendant's rights under the doctrine of res judicata or certain other principles, "might loosely be described" as a "right not to stand trial." 511 U.S. at 873. The Court therefore held that it is not a "sufficient" basis to allow a collateral appeal that the right at issue might be so characterized. *Id.* at 871. The Court also eschewed any notion of a "single, 'obviously correct way to characterize'" rights subject to immediate appeal, *ibid.* (quoting *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 500 (1989)), in favor of an assessment of the "importance" of the interests at stake, *id.* at 878. *Digital Equipment* establishes, then, that the appropriateness of immediate appeal depends on "a judgment about the

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[3] Moreover, the "merits" of an FTCA suit include not only questions of state tort law incorporated into the FTCA by 28 U.S.C. 1346 and 2674, but also the limitations on the United States' liability as a matter of *federal* law under the exceptions in 28 U.S.C. 2680, which also are incorporated into Sections 1346 and 2674. See pp. 13-16, *infra*.

value of the interests that would be lost" if appeal were not allowed, 511 U.S. at 878-879. See *id.* at 878 (right must "rise to the level of importance needed for recognition under § 1291").

It is clear that the right not to be subject to litigation on a claim that has already been adjudicated can, in appropriate circumstances, satisfy the requirements for immediate appeal. In *Abney* v. *United States*, 431 U.S. 651 (1977), for example, the Court upheld immediate appeal from the denial of a motion to dismiss a second criminal complaint on double jeopardy grounds, recognizing that, after a person has already been subjected to criminal jeopardy once, only immediate appeal could give "full protection" to the constitutional right "not to face trial" for a second time. *Id.* at 662 & n.7. While ordinary res judicata, Section 2676, and the Double Jeopardy Clause each establish a rule of preclusion, there are two features that distinguish Section 2676 from res judicata and place a Section 2676 claim, like a double jeopardy claim, at "the level of importance needed for recognition under § 1291." *Digital Equipment*, 511 U.S. at 878.

First, unlike the common law doctrine of res judicata, the rights protected by the Double Jeopardy Clause and Section 2676 "originat[e] in the Constitution or statutes." *Digital Equipment*, 511 U.S. at 879. In *Digital Equipment*, the Court emphasized that rights not to stand trial that "originat[e] in the Constitution or statutes" have preferred status under the collateral order doctrine because "[w]hen a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit * * *, there is little room for the judiciary to gainsay its 'importance.'" *Ibid.*; see *ibid.* ("Where statutory and constitutional rights are concerned, 'irretrievabl[e] los[s]' can hardly be trivial.") (alterations in original).

Second, the public interest served by Section 2676—avoiding unnecessary distraction, inhibition, and demoralization of government employees in performance of their public

duties—has already been held to justify immediate appeal. That interest is so important that common law qualified immunity is an exception to the general rule that immunities must have a statutory or constitutional basis in order to warrant review under the collateral order doctrine. See *Digital Equipment*, 511 U.S. at 874-875. Indeed, that interest is so compelling that an employee may appeal his qualified immunity claim at *both* the motion to dismiss stage and again at summary judgment. *Behrens* v. *Pelletier*, 516 U.S. 299, 309 (1996). Those same interests, especially when recognized in statute, amply justify an immediate appeal.

B. Respondents' FTCA Suit Was "An Action Under Section 1346(b)," And The "Judgment" In That Suit Bars Respondents' Action Against Petitioners Individually

Respondents do not dispute as a general matter that the complete bar in Section 2676 applies where, as here, the judgment in the FTCA action was in favor of the United States and also where, as here, the subsequent action against the individual employee is based on *Bivens*. See Gov't Br. 26-28 & n.5. Respondents contend, however, that Section 2676 is inapplicable here (1) because their FTCA suit was not an "action under section 1346(b)," despite the fact that Section 1346(b) was (necessarily) the sole basis for the FTCA suit, Pet. App. 5a, 27a, and (2) because the dismissal of their FTCA suit was not a "judgment" within the meaning of Section 2676. Neither argument has merit.

1. An Action That Asserts The Six Elements In Section 1346(b) Is "An Action Under Section 1346(b)," Even If The Claim Is Ultimately Barred By Section 2680

As discussed in our opening brief (at 31-38), Section 2676's phrase "an action under Section 1346(b)" is directly parallel to the text of the FTCA's exclusivity provisions, which similarly bar suits against agencies or employees where Section 1346(b) is or could be invoked in an effort to hold the United States liable. See 28 U.S.C. 2679(a), (b) and (d). In

specifying that FTCA suits against the United States are exclusive, Section 2679(a) refers to a claim "cognizable under Section 1346(b)," and Section 2679(d)(4) refers to an "action against the United States filed pursuant to section 1346(b)." See also 28 U.S.C. 2679(b)(1) ("The remedy against the United States provided by section[] 1346(b) * * * is exclusive," and "[a]ny other civil action" against the employee relating to the same subject matter "is precluded"). Each of those analogous provisions has been construed to encompass actions that allege the basic elements set forth in Section 1346(b) itself, even though the action may, in the end, be unsuccessful because one of the Section 2680 exceptions bars recovery. See *FDIC* v. *Meyer*, 510 U.S. 471, 477 (1994) ("a claim is actionable under § 1346(b) if it alleges the six elements outlined" therein); *United States* v. *Smith*, 499 U.S. 160, 165-166 (1991); *Audio Odyssey, Ltd.* v. *United States*, 255 F.3d 512, 522 (8th Cir. 2001); *Davric Maine Corp.* v. *USPS*, 238 F.3d 58, 61-64 (1st Cir. 2001); *Franklin Sav. Corp.* v. *United States*, 180 F.3d 1124, 1142-1143 (10th Cir.), cert. denied, 528 U.S. 964 (1999).

Respondents nonetheless argue that an action that fails on account of one of the Section 2680 exceptions cannot be an "action under section 1346(b)" within the meaning of Section 2676 because Section 2680 says that Section 1346(b) "shall not apply" to claims covered by the specified exceptions. Resp. Br. 41-42. That is the same argument that this Court specifically rejected in *Smith*, in which it held that Section 2679(b)(1)'s phrase "[t]he remedy * * * provided by section[] 1346(b)" encompassed the plaintiffs' claim even though, in that case, Section 2680(k)'s foreign country exception meant that "the FTCA itself does not provide a means of recovery." 499 U.S. at 166. The Court made a similar point in *Meyer*, explaining that, under Section 2679(a), "[t]he question is not whether a claim is cognizable *under the FTCA* generally, * * * but rather whether it is 'cognizable *under section 1346(b)*'" in particular. 510 U.S. at 477 n.5.

See *Davric*, 238 F.3d at 62-63 (finding argument regarding Section 2679(a) based on Section 2680's "shall not apply" language "not tenable" in light of the overall statutory scheme).

Respondents argue that the construction of Section 2679(b) and (d) in *Smith* and of Section 2679(a) in *Meyer* and its progeny should be disregarded because of minor variations among the provisions. For example, respondents urge that Section 2679(a)'s phrase "claims * * * cognizable section 1346(b)," at issue in *Meyer*, is somehow broader than Section 2676's phrase "action under section 1346(b)." Resp. Br. 44. Tellingly, respondents offer no definition of "cognizable" to support that assertion, and, contrary to respondents' premise, the phrase "action under section 1346(b)" is, if anything, the *broader* of the two. Whereas the phrase "claims * * * cognizable under section 1346(b)" might connote a claim over which the district court would actually have jurisdiction, see *Black's Law Dictionary* (4th ed. 1951) (defining "cognizable" as "within jurisdiction of court"), the phrase "action under section 1346(b)" is more naturally understood as focusing on the basis for the claim *asserted* by the plaintiff. In any event, this Court has already equated the phrase "cognizable under section 1346(b)" with "actionable under § 1346(b)," *Meyer*, 510 U.S. at 477, and respondents offer no basis for concluding that an "action under section 1346(b)" means something other than a claim that is "actionable under § 1346(b)."

Respondents' effort to distinguish *Smith* fares no better. Respondents note (Br. 46) that *Smith* relied on the language of Section 2679(d)(4) providing that, after substitution of the United States for the federal employee defendant, the suit proceeds as "any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions." But this language proves that Congress regards an FTCA action that is barred on account of "the limitations and exceptions" of Section 2680 to be, nonetheless, an "action

* * * filed pursuant to section 1346(b)." 28 U.S.C. 2679(d)(4). Respondents do not even suggest that the phrase "action * * * filed pursuant to section 1346(b)" in Section 2679(d)(4) is meaningfully different from the phrase "action under section 1346(b)" in Section 2676.

The disparate meanings respondents attribute to these parallel provisions would, moreover, render the statutory scheme unworkable. Assume, for example, that a plaintiff sues a federal employee for a state law tort within the scope of his employment, and, after the United States is substituted, the suit proceeds as an "action * * * filed pursuant to section 1346(b)," 28 U.S.C. 2679(d)(4), and the claim is dismissed based on one of the exceptions in Section 2680. Under respondents' view, the judgment in that "action * * * filed pursuant to section 1346(b)" would not be a judgment in an "action under section 1346(b)," and therefore would not trigger Section 2676's bar to a new suit against the employee. That argument, to borrow respondents' phrase, "requires linguistic gymnastics beyond the flexibility of the English language." Resp. Br. 44. Nor is there any reason why Section 2676's application should depend on whether, as in the example just described, the first suit alleging state tort claims was brought initially against the employee and the United States was substituted or, as here, was brought against the United States under Section 1346(b) in the first instance.

Respondents' construction is also inconsistent with the purposes of Section 2676. In respondents' view, the plaintiff in the example above would be free to start over again, bringing a new action against the federal employee with slightly different allegations designed to avoid the United States' substitution, such as asserting that the employee was acting outside the scope of his employment or acted intentionally rather than negligently, so that the claim would assume constitutional dimension. But there is nothing in either the text or purposes of Section 2676 that would sup-

port such a result. The unwarranted distraction and cost of defending against such repetitive lawsuits is one of the specific ills that the judgment bar was designed to prevent. See *Gilman*, 347 U.S. at 511 n.2 (testimony of Assistant Attorney General Shea); *Gasho* v. *United States*, 39 F.3d 1420, 1437 (9th Cir. 1994) (Section 2676 reflects Congress's "concern[] about the government's ability to marshal the manpower and finances to defend subsequent suits against its employees"), cert. denied, 515 U.S. 1144 (1995).

This very case in fact exemplifies the problem with respondents' position. Respondents initially sued on a theory that the federal employees had acted negligently in violation of state tort law. See First Restated And Amended Complaint For Damages, No. 02-CV-942, at 6 (N.D.N.Y.) [lodged with the Court]. After the district court entered judgment on March 24, 2003, holding that the negligence claims were barred by the FTCA's detention-of-goods exception, Pet. App. 39a-40a, respondents amended the complaint in their later-filed suit against the employee defendants on May 1, 2003, to assert for the first time that the federal employees had *intentionally* deprived respondents of their property. Compare J.A. 25 ("acts of negligence committed by Defendants") with J.A. 34 ("by intentionally depriving Plaintiffs of their intellectual property").[4] Respondents' attempt (Br. 6) to support the allegation of intentionality with evidence that was not developed until four months after judgment was en-

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[4] Respondents attempt to explain the belated allegation of intent with reference to an expert affidavit. See Resp. Br. 6. The district court twice specifically denied respondents' motions for leave to submit the expert affidavit, C.A. App. A-7 (dkt. no. 32); *ibid.* (dkt. no. 34), but trial counsel nevertheless submitted the affidavit as an attachment to respondents' memorandum in opposition to petitioners' motion to certify the district court's August 20 Order for interlocutory appeal, as to which the affidavit was inapposite. C.A. App. A-8 (dkt. no. 42). In any event, the affidavit reveals that the expert's analysis did not take place until July 2003, two months *after* respondents made their allegation of intentional misconduct. C.A. App. A-36.

tered against them on their negligence claims against the United States (see note 4, *supra*) demonstrates precisely the kind of relitigation of old claims that Section 2676 is designed to prevent. Even under ordinary principles of res judicata, upon which respondents rely, it is clear that a plaintiff cannot avoid claim preclusion simply by offering new evidence and a new theory of liability that were not offered in the first suit. See Restatement (Second) Judgments § 25 (1982) (claim preclusion applies "even though the plaintiff is prepared in the second action * * * [t]o present evidence or grounds or theories of the case not presented in the first").

2. The Judgment Dismissing Respondents' FTCA Action As Barred By the Detention-Of-Goods Exception Was A "Judgment" Within The Meaning Of Section 2676

Respondents argue that, even if their prior suit was an "action under section 1346(b)," the judgment in that case does not trigger Section 2676's bar because, in their view, Section 2676 applies only to judgments on "the merits," whereas a judgment on the basis of a Section 2680 exception is a dismissal for "lack of subject matter jurisdiction." Resp. Br. 26. Respondents' effort to read such an implied limitation into Section 2676 is inconsistent with the text and structure of the FTCA. In any event, respondents' argument fails on its own terms. As numerous courts have recognized, a dismissal on grounds of sovereign immunity *is* a judgment "on the merits" entitled to res judicata (claim preclusive) effect where, as here, the immunity is grounded in a substantive limitation on liability.

a. Respondents' argument is inconsistent with the text of Section 2676 and ignores the substantive nature of the Section 2680 exceptions

The text of Section 2676 does not differentiate between FTCA judgments that are entered for lack of jurisdiction and those that are not. Nor does the text of Section 2676 differentiate between a judgment that rests on a limitation of

liability under *state* law incorporated into Sections 1346(b) and 2674 and a limitation of liability imposed as a matter of *federal* law by Section 2680 and incorporated into Sections 1346(b) and 2674. Respondents' attempt to insert such distinctions into Section 2676 is inconsistent with the substantive nature of the Section 2680 exceptions. That substantive nature is evidenced by: (1) Section 2680's text, which expressly provides that the exceptions limit *both* the district court's jurisdiction under Section 1346(b) *and* the United States' liability under Section 2674, Gov't Br. 39; (2) this Court's repeated references to Section 2680 as a limitation on the United States' substantive FTCA liability, *id.* at 40; (3) the extensive litigation that is often entailed in establishing the applicability of a Section 2680 defense, *id.* at 44-45; and (4) the similarity of certain Section 2680 exceptions and substantive common law defenses to liability, *id.* at 45.

Respondents do not contest any of this. Rather, they attempt to brush it aside with the assertion that "the key inquiry is not whether the exceptions have 'substantive' content, but their role in the FTCA." Resp. Br. 33. As just explained, however, the principal role of the Section 2680 exceptions in the FTCA is to impose limitations on the United States' liability. Where the United States is not liable because of the applicability of one of the exceptions in Section 2680 and judgment is entered for the United States on that ground, both the text and purpose of Section 2676 are triggered. Indeed, it would be bizarre to give, as respondents urge, *greater* preclusive effect within the FTCA's comprehensive remedial scheme to *state* law limitations on the liability of the United States than to such limitations under *federal* law contained in the FTCA itself.

Respondents recognize the absurdities that would result from a purely formalistic adherence to a "lack of jurisdiction" rule in the context of the FTCA, and they therefore acknowledge that, in certain instances, an FTCA dismissal that technically goes to the court's jurisdiction properly *would*,

because of its substantive character, be recognized as a "judgment" within the meaning of Section 2676. For example, Section 1346(b) establishes as a jurisdictional requirement that the complaint allege circumstances under which "a private person[] would be liable to the claimant in accordance with the law of the place where the act or omission occurred." See, *e.g.*, *Bolduc* v. *United States*, 402 F.3d 50, 59 (1st Cir. 2005) (dismissing action for lack of subject matter jurisdiction because Wisconsin law requires an allegation of malice in an action related to law enforcement and the complaint made no such allegation). Respondents acknowledge (Br. 34-35) that such a ground for dismissal would qualify as a "judgment" for purposes of the judgment bar, as, indeed, the courts have held, see, *e.g.*, *Harris* v. *United States*, 422 F.3d 322 (6th Cir. 2005) (dismissing *Bivens* claim against federal employee where the plaintiff's FTCA claim had failed because, among other reasons, the plaintiff had failed to show the malice required by Ohio law).

Respondents attempt to distinguish such application of the judgment bar on the ground that where, as in the FTCA, jurisdiction is defined "in terms of the violation alleged or remedy available," a court ruling that no remedy is available is not "jurisdictional" in the most fundamental sense but is instead an exercise of the court's "authority to adjudicate" whether the statutory requirements for liability are met. Resp. Br. 34-35. Respondents are correct in their assessment of the FTCA's private person liability requirement, but fail to recognize that the same point also applies to the exceptions set forth in Section 2680. The determination by the district court that respondents' FTCA action was covered by the exception in Section 2680(c) likewise was an exercise of its "authority to adjudicate" limitations on the United States' liability in an action brought under Section 1346(b).

As this Court has observed, the FTCA makes the questions of jurisdiction, immunity, and liability coextensive.

Meyer, 510 U.S. at 479 (Section 1346(b) "describes the scope of jurisdiction by reference to claims for which the United States has waived its immunity and rendered itself liable"). The identity of those inquiries is manifested by the fact that the requirement of private party liability under state law is set out in both 28 U.S.C 1346(b), which waives the United States' immunity and grants the courts jurisdiction, and 28 U.S.C. 2674, which defines the United States' liability. The joint jurisdiction/merits inquiry is likewise reflected in the fact that Section 2680 specifies that the exceptions govern *both* "[t]he provisions of this chapter [including Section 2674] and section 1346(b)." 28 U.S.C. 2680.

Respondents cannot explain why the limitation on the United States' FTCA liability that refers to state law, which appears in both Section 1346(b) and Section 2674, should implicate Section 2676's judgment bar, whereas the "exceptions to FTCA liability contained in § 2680," *Molzof* v. *United States*, 502 U.S. 301, 310-311 (1992), which likewise limit both Section 1346(b) and Section 2674, should not.[5]

b. Even if Section 2676 were interpreted with reference to res judicata doctrine, dismissal under Section 2680(c) would qualify as a judgment "on the merits" to which preclusion would attach

Even if the Court were to accept respondents' contention that Section 2676 should be interpreted through the prism of

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[5] Respondents argue (Br. 39-40) that, under petitioners' theory, an FTCA judgment in the government's favor on the ground that the federal employee was not acting within the scope of employment would, under Section 2676, bar the plaintiff from suing the employee directly. That is not so. Claims based on such conduct are wholly beyond the purview of the FTCA. A determination in an action initially filed under the FTCA that the employee was not acting within the scope of employment is the equivalent of a determination under 28 U.S.C. 2679(d), in an action initially filed against the employee, that the United States should not be substituted as the defendant. The consequence of that determination is the same in either case: The claim can proceed against the employee individually.

res judicata doctrine, a Section 2680(c) dismissal would *still* qualify as a judgment triggering Section 2676's bar because dismissals on grounds of sovereign immunity are regarded as judgments "on the merits" for purposes of res judicata where the immunity reflects a substantive limitation on the sovereign's liability.

It has often been noted that the "on the merits"/"lack of jurisdiction" dichotomy in traditional res judicata doctrine is unhelpful because of the lack of clarity in the two terms. The "word 'jurisdiction' * * * can play different roles in different legal contexts," *Rose* v. *Town of Harwich*, 778 F.2d 77, 79-80 (1st Cir. 1985) (Breyer, J.), cert. denied, 476 U.S. 1159 (1986); accord *Kontrick* v. *Ryan*, 540 U.S. 433, 454-455 (2004), and the Second Restatement has abandoned the phrase "on the merits" in the text of the general rule "because of its possibly misleading connotations." Restatement (Second) Judgments § 19, cmt. a (1982). "The *Restatement* means the word ['jurisdiction'] to refer to typical 'jurisdictional' dismissals—where, for example, a plaintiff sues in the wrong court. * * * They rest upon * * * defects of a technical or procedural nature which, if cured, normally ought not to bar a plaintiff from bringing the action again." *Rose*, 778 F.2d at 79-80. See *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1192 (D.C. Cir. 1983) (Scalia, J.) (referring to the jurisdiction exception to res judicata as the "'curable defect' exception," which applies where a precondition that was absent in the first suit can be and is remedied before the second). On the other hand, as this Court has recognized, the phrase "on the merits" encompasses a determination that, though "declining to reach [the] ultimate substantive issues," is "based not on the ground that the distribution of judicial power among the various courts of the State requires the suit to be brought in another court in the State, but on the inaccessibility of all the courts of the State to such litigation." *Angel* v. *Bullington*, 330 U.S. 183, 190 (1947).

Although respondents base their entire argument on the contention that a dismissal on sovereign immunity grounds is for lack of jurisdiction and for that reason is not entitled to res judicata effect (or, therefore, to preclusive effect under Section 2676), they do not discuss a single case that actually addressed res judicata principles in the context of a dismissal on sovereign immunity grounds. In fact, numerous judicial decisions reflect that a dismissal on sovereign immunity grounds does operate as a dismissal "on the merits" when the immunity reflects a substantive limitation on the government's liability (as is clearly the case under the FTCA). See, *e.g.*, *Flores* v. *Edinburg Consol. Indep. Sch. Dist.*, 741 F.2d 773, 775 n.3 (5th Cir. 1984) ("A summary judgment on grounds of sovereign immunity is," under Texas law, "a judgment on the merits for purposes of res judicata."); *Kutzik* v. *Young*, 730 F.2d 149, 151 (4th Cir. 1984) ("In Maryland, a dismissal based on a defense of sovereign immunity meets the final judgment requirement for application of claim preclusion."); *Bloomquist* v. *Brady*, 894 F. Supp. 108, 116 (W.D.N.Y. 1995) ("A dismissal based on sovereign immunity is a decision on the merits, as it determines that a party has no cause of action or substantive right to recover against the United States."); *Beaver* v. *Bridwell*, 598 F. Supp. 90, 93 (D. Md. 1984); *Mills* v. *Lincoln County*, 864 P.2d 1265, 1266-1267 (Mont. 1993); *Annapolis Urban Renewal Auth.* v. *Interlink, Inc.*, 405 A.2d 313, 317 (Md. Ct. Spec. App. 1979); *Herring* v. *Texas Dep't of Corr.*, 500 S.W.2d 718, 720 (Tex. Civ. App. 1973), aff'd, 513 S.W.2d 6 (Tex. 1974). As the Ninth Circuit explained in an FTCA case, whereas, "[o]rdinarily, a case dismissed for lack of subject matter jurisdiction should be dismissed without prejudice so that a plaintiff may reassert his claims in a competent court," if, because of the discretionary function exception, "the bar of sovereign immunity is absolute [and] no other court has the power to hear the case," the case is properly dismissed "with prejudice." *Frigard* v. *United States*, 862 F.2d 201, 204 (9th

Cir. 1988), cert. denied, 490 U.S. 1098 (1989) (citation omitted). See *Midwest Knitting Mills, Inc.* v. *United States*, 741 F. Supp. 1345, 1352 (E.D. Wis. 1990) (same), aff'd, 950 F.2d 1295 (1991).[6]

To be sure, some sovereign immunity dismissals qualify as "jurisdictional" in the "typical" sense that the "plaintiff sue[d] in the wrong court," *Rose*, 778 F.2d at 79-80, or his suit suffered from a "curable defect," *Dozier*, 702 F.2d at 1192. In those cases the first dismissal "does not preclude a party from litigating the same cause of action in *a court of competent jurisdiction*." *Magnus Elecs., Inc.* v. *La Republica Argentina*, 830 F.2d 1396, 1400 (7th Cir. 1987) (dismissal on basis of foreign state's immunity from suit in the United States would not bar suit in another, competent court, but did bar a second suit in federal court). See *GAF Corp.* v. *United States*, 818 F.2d 901, 912-914 (D.C. Cir. 1987) (dismissal of FTCA claim for failure to satisfy exhaustion requirement does not preclude suit after defect has been cured); *Voisin's Oyster House, Inc.* v. *Guidry*, 799 F.2d 183, 188 (5th Cir. 1986) (dismissal on ground of State's Eleventh Amendment immunity in federal court would not bar second suit in court of competent jurisdiction).

The dismissal of respondents' FTCA action on the basis of the detention-of-goods exception did not reflect merely "the distribution of judicial power among the various courts."

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[6] Two other courts of appeals have, in dictum in the context of deciding which Federal Rule of Civil Procedure should govern a Section 2680 dismissal, expressed a view on whether an FTCA judgment in the government's favor on the basis of a Section 2680 exception would have res judicata effect. See *Williams* v. *United States*, 50 F.3d 299, 304-305 (4th Cir. 1995) (dismissal on Section 2680 grounds should be under Rule 12(b)(1) because "dismissal for jurisdictional defects has no *res judicata* effect"); *Wheeler* v. *Hurdman*, 825 F.2d 257, 259 & n.5 (10th Cir.) (FTCA exceptions should be decided under Rule 56, rather than Rule 12(b)(1), because it would then have claim preclusive effect), cert. denied, 484 U.S. 986 (1987). Neither decision, however, contains any sustained analysis of the issue.

Angel, 330 U.S. at 190. Rather, it effectuated an affirmative congressional determination to impose substantive limits on "the liability of the United States under the FTCA." *United States* v. *Gaubert*, 499 U.S. 315, 322 (1991). Where, as here, the basis of the dismissal, even if phrased in jurisdictional terms of sovereign immunity, reflects "'a significant substantive policy'" determination that, "as a substantive matter, the plaintiff cannot maintain his cause of action," the dismissal is "a judgment on the merits" with claim preclusive effect. *Annapolis Urban Renewal*, 405 A.2d at 318-319 (quoting *Weston Funding Corp.* v. *Lafayette Towers, Inc.*, 550 F.2d 710, 714 (2d Cir. 1977)).

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed, and the case remanded with instructions to dismiss the complaint.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

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